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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Ruth Bradburn Mitchell, individually and CV 11-08140-PCT-FJM  
as personal representative of the Estate of)  
10 Kenneth Mitchell; Kenneth Christopher)  
11 Mitchell,  
12 Plaintiffs,  
13 vs.  
14 City of Flagstaff; Roy Taylor; Jane Doe)  
15 Taylor,  
16 Defendants.  
17 \_\_\_\_\_)

ORDER

18 The court has before it defendants' amended Rule 37(c)(1) motion to exclude expert  
19 opinions of Ronald Scott (doc. 107), plaintiffs' response (doc. 116), and defendants' reply  
20 (doc. 122).<sup>1</sup>

21 Our Rule 16 scheduling order set plaintiffs' expert disclosure deadline as April 20,  
22 2012, defendants' expert disclosure deadline as May 21, 2012, and the rebuttal expert  
23 disclosure deadline for all parties as June 20, 2012 (doc. 25 at 2). The final supplementation  
24 deadline was July 20, 2012, and the discovery deadline is August 21, 2012. Rule 16 Order  
25 at 2-3.

26 \_\_\_\_\_)  
27 <sup>1</sup> Defendants originally filed a motion to strike Scott's opinions on July 12, 2012. We  
28 ordered defendants to file an amended motion that complied with our page limits on  
discovery motions, and set an expedited briefing schedule (doc. 106).

1 Plaintiffs retained James Serpa as an expert witness in November, 2011. According  
 2 to plaintiffs, Serpa first notified them on April 3, 2012 that he needed to have physical  
 3 evidence released to him to finalize his conclusions. The parties engaged in extensive  
 4 discussions concerning the release of evidence. Ultimately, although defendants would not  
 5 release the evidence into Serpa's custody, defendants arranged for Serpa to inspect and test  
 6 the evidence at the Flagstaff Police Department on April 16, 2012. Serpa never showed up.  
 7 On April 20, 2012, plaintiffs disclosed Serpa's preliminary report, which defendants describe  
 8 as "completely devoid of any opinions, conclusions, examination results or data." Mot. at  
 9 1. Plaintiffs acknowledge that the report was "substandard." Response at 2.

10 Serpa unexpectedly quit on May 2, 2012. On May 11, 2012, plaintiffs filed a motion  
 11 to substitute Ronald Scott as their expert witness, which we granted on June 20, 2012 (doc.  
 12 78).<sup>2</sup> In the meantime, defendants served their expert disclosure on May 21, 2012 (doc. 58).  
 13 Plaintiffs disclosed Scott's expert report on June 20, 2012. Defendants have scheduled  
 14 Scott's deposition for August 3, 2012.

15 If a party fails to provide information as required by Rule 26(a), Fed. R. Civ. P., the  
 16 improperly disclosed evidence is excluded unless the improper disclosure was either  
 17 substantially justified or harmless. See Fed. R. Civ. P. 37(c)(1); Yeti by Molly, Ltd. v.  
 18 Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001). Defendants argue that because  
 19 Serpa's preliminary report was deficient, Scott's recently disclosed opinions are untimely and  
 20 should be excluded.

21 Plaintiffs do not contend that Serpa's preliminary report complied with Rule 26(a)(2),  
 22 Fed. R. Civ. P. They argue that they were substantially justified under the circumstances in  
 23 submitting Serpa's report in order to meet the April 20th deadline. We disagree. At the time  
 24 plaintiffs were required to disclose Serpa's report, Serpa had not yet quit. Plaintiffs have  
 25 offered no explanation for why they did not seek an extension of the expert disclosure  
 26 deadline, despite knowing that Serpa needed to inspect and test evidence to render his

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 28 <sup>2</sup> We did not rule as to whether any of Serpa or Scott's opinions should be excluded.

1 conclusions, and despite knowing that Serpa failed to show up at an appointment to test the  
 2 evidence only four days before the deadline to disclose his report.<sup>3</sup> Instead, they elected to  
 3 disclose Serpa's preliminary report on time, although the report was, in plaintiffs' own words,  
 4 substandard. Under these circumstances, plaintiffs' failure to comply with Rule 26(a)(2),  
 5 Fed. R. Civ. P. was not substantially justified.

6 Plaintiffs argue that the disclosure of Scott's opinions on June 20th is harmless  
 7 because defendants have already had Scott's report for a month, did not take Serpa's  
 8 deposition, and have scheduled Scott's deposition. The late disclosure of Scott's opinions,  
 9 however, has affected defendants. Because defendants were required to disclose their experts  
 10 by May 21, 2012, defendants' experts were unable to review and consider Scott's opinions  
 11 in formulating their expert reports. See Schuette v. City of Phoenix, CV-08-2018-PHX-  
 12 MHM, 2010 WL 1253193, at \*4 (D. Ariz. Mar. 25, 2010) (plaintiff's late disclosure of expert  
 13 report "unfairly and inappropriately forced" defendants' expert to prepare his report without  
 14 "the opportunity to respond specifically to [plaintiff's expert's] conclusions and analysis of  
 15 the relevant data"). Moreover, the disclosure of Scott's report on the rebuttal expert  
 16 disclosure deadline prevented defendants from disclosing rebuttal experts to counter Scott's  
 17 opinions.

18 Permitting plaintiffs to utilize Scott's expert opinions without providing any  
 19 accommodations to defendants would not be harmless. We recognize, however, that Serpa's  
 20 unexpected departure (and defendants' objection to the substitution of Scott) made it difficult  
 21 for plaintiffs to immediately address the preliminary report's deficiencies in a way that could  
 22 have lessened the harm to defendants. Moreover, defendants waited three weeks after  
 23 receiving Scott's report to file their motion to exclude, which may have compounded their  
 24 harm.

25 When faced with a similar situation of plaintiff's untimely disclosure of an expert

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 27 <sup>3</sup> Plaintiffs did request a six-month extension of all deadlines on March 28, 2012,  
 28 arguing only that it would be burdensome to meet the deadlines because more discovery was  
 needed (doc. 37). The motion was denied (doc. 38).

1 opinion, Schuette concluded that an appropriate remedy was to permit defendants to submit  
2 an amended expert report and recoup attorneys' fees and costs incurred in obtaining the  
3 amendment. Id. We conclude that the harm to defendants caused by the late disclosure of  
4 Scott's opinions can be remedied without imposing the heavy sanction of exclusion. Given  
5 that discovery has not yet closed and Scott's deposition has already been scheduled, a  
6 solution similar to Schuette will sufficiently alleviate any harm. Defendants recognize that  
7 the "only way to remedy the harm caused to Defendants would be to extend their rebuttal  
8 expert disclosure deadline." Reply at 2. We can provide defendants with an opportunity to  
9 rebut Scott's opinions without upsetting the other deadlines set forth in the Rule 16  
10 scheduling order.

11 **IT IS ORDERED DENYING** defendants' motion to exclude expert opinions of  
12 Ronald Scott (doc. 107).

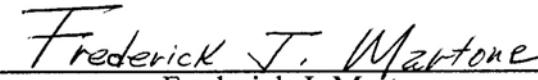
13 **IT IS ORDERED** that defendants may have up to and including August 6, 2012 to  
14 file an amended version of their expert report(s), limited to amendments that address Ronald  
15 Scott's opinions.

16 **IT IS ORDERED** that defendants may have up to and including August 6, 2012 to  
17 disclose any rebuttal experts, limited to experts who will rebut Ronald Scott's opinions.

18 **IT IS FURTHER ORDERED** that, after judgment has been entered in this case,  
19 defendants may file a motion for attorneys' fees and costs related to obtaining an amended  
20 version of their expert report(s) in accordance with LRCiv 54.2.

21 This order shall not be construed to affect any other deadline set forth in the  
22 scheduling order.

23 DATED this 25<sup>th</sup> day of July, 2012.

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26 Frederick J. Martone  
27 United States District Judge  
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